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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 TERRI M.-Q.,

10 Plaintiff,

CASE NO. C19-6136-MAT

11 v.

12 COMMISSIONER OF SOCIAL SECURITY,

ORDER RE: MOTION FOR EQUAL
ACCESS TO JUSTICE ACT FEES

13 Defendant.

14 INTRODUCTION

15 Plaintiff filed a motion for attorney fees and expenses pursuant to the Equal Access to
16 Justice Act (EAJA), 28 U.S.C. § 2412. Dkt. 33. The Commissioner argues Plaintiff is not entitled
17 to EAJA fees because the Commissioner's position was "substantially justified," or, in the
18 alternative, requests that the Court find the fee request unreasonable and award a reduced amount.
19 Dkt. 34. For the reasons explained below, the Court finds that the Commissioner's position was
20 substantially justified and therefore DENIES Plaintiff's motion.

21 DISCUSSION

22 Under EAJA, the Court awards fees and expenses to a prevailing party in a suit against the
23 government unless it concludes the position of the government was "substantially justified or that

1 special circumstances make an award unjust.” 28 U.S.C. § 2412(d)(1)(A). Having secured a
2 remand of this matter, Plaintiff is the prevailing party. *Akopyan v. Barnhart*, 296 F.3d 852, 854
3 (9th Cir. 2002). Nor are there any special circumstances that would make an award unjust.

4 The Commissioner’s position is deemed substantially justified if it meets the traditional
5 standard of reasonableness, meaning it is “justified in substance or in the main, or to a degree that
6 could satisfy a reasonable person.” *Lewis v. Barnhart*, 281 F.3d 1081, 1083 (9th Cir. 2002) (quoted
7 sources and internal quotations omitted). While the government’s position need not be correct, it
8 must have “‘reasonable basis in law and fact.’” *Id.* (quoting *Pierce v. Underwood*, 487 U.S. 552,
9 566 n.2 (1988)). “‘The government bears the burden of demonstrating substantial justification.’”
10 *Thangaraja v. Gonzales*, 428 F.3d 870, 874 (9th Cir. 2005) (quoting *Gonzales v. Free Speech*
11 *Coalition*, 408 F.3d 613, 618 (9th Cir. 2005)).

12 In considering substantial justification, the Court first considers the underlying agency
13 action, meaning the decision of the ALJ, and then considers the government’s litigation position.
14 *Meier v. Colvin*, 727 F.3d 867, 872 (9th Cir. 2013). A “‘holding that the agency’s decision . . .
15 was unsupported by substantial evidence is . . . a strong indication that the ‘position of the United
16 States’ . . . was not substantially justified.’” *Id.* (quoting *Thangaraja*, 428 F.3d at 874). Indeed,
17 only in a “‘decidedly unusual case’” will there be “substantial justification under the EAJA even
18 though the agency’s decision was reversed as lacking in reasonable, substantial and probative
19 evidence in the record.’” *Thangaraja*, 428 F.3d at 874 (quoted case omitted).

20 In this case, the Court ordered a remand upon concluding that the opinion of examining
21 physician Donna Moore, M.D., which was excluded by the administrative law judge (ALJ) but
22 incorporated into the record by the Appeals Council, undermined the ALJ’s decision. *See* Dkt. 31.
23 The Court found no harmful error in the ALJ’s assessment of the opinion of Dawson Brown, M.D.,

1 or in any other particular part of the ALJ's decision, but found that the ALJ on remand should
2 reconsider Plaintiff's subjective testimony describing physical allegations and any other part of
3 the decision impacted by the updated record on remand. *Id.*

4 The Commissioner maintains that his position was substantially justified because the ALJ
5 had properly excluded Dr. Moore's opinion, and because Dr. Moore's opinion is similar enough
6 to Dr. Brown's opinion and thus the ALJ's proper reasons for discounting Dr. Brown's opinion
7 could have been applied equally to Dr. Moore's opinion. Dkt. 34. The Commissioner argues that
8 this case is analogous to *Decker v. Berryhill*, because the Appeals Council evidence that led to the
9 remand arguably, but not overwhelmingly, undermined the ALJ's decision. *See* Dkt. 34 at 5 (citing
10 856 F.3d 659, 665 (9th Cir. 2017)). In *Decker*, the Ninth Circuit found that although the district
11 court had found that new evidence considered by the Appeals Council required remand because it
12 could be interpreted in a way that undermined the ALJ's decision, that "result was not inevitable"
13 and thus the Commissioner was substantially justified in opposing remand. 856 F.3d at 665.

14 The Court agrees that *Decker* is instructive. Dr. Moore's opinion is similar to Dr. Brown's
15 properly discounted opinion in that they were expressed on the same form and described some of
16 the same limitations, yet the opinions were not identical and nonetheless distinguishable, as the
17 Court explained in its remand order. Dkt. 31 at 6-7. The Court did not agree with the
18 Commissioner's position as to the extent of the similarity between the opinions, but did not entirely
19 reject any suggestion of similarity, and this type of ruling does not imply that the Court reached
20 the only reasonable result. *See Decker*, 856 F.3d at 665 ("Decker's new evidence, though
21 sufficient in the end to persuade the district court to remand the case, did not make that the only
22 reasonable result."). Given that Plaintiff herself emphasized the similarity between Dr. Moore's
23 and Dr. Brown's opinions in her briefing (Dkt. 27 at 5 ("Dr. Moore's functional assessment closely

1 aligned with and bolstered similar limitations contained in Dr. Brown's medical source
2 statement'')), remand was not a foregone conclusion. Accordingly, the Court finds that the
3 Commissioner was substantially justified in his litigation position. *See Decker*, 856 F.3d at 662
4 (finding substantial justification "because the Commissioner's opposition to remand of the claim
5 on the merits was reasonable, even though it turned out to be unsuccessful").

6 Furthermore, because the Court found no error in the ALJ's decision based on the record
7 before the ALJ, the Court finds that the Commissioner was also substantially justified in his
8 underlying position. Thus, because the Commissioner was substantially justified in the underlying
9 decision and in his litigation position, the Court finds that Plaintiff is not entitled to EAJA attorney
10 fees and expenses.

11 CONCLUSION

12 For all of these reasons, the Court finds that the Commissioner's position was substantially
13 justified, and therefore DENIES Plaintiff's motion (Dkt. 33).

14 DATED this 26th day of February, 2021.

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17 Mary Alice Theiler
18 United States Magistrate Judge
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